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No. 93-1915

In the Supreme Court of the United States

OCTOBER TERM, 1994

FLOYD THOMAS ALTIMUS and
JANICE M. CHURCH,

Petitioners,

v.

STATE OF OREGON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF OREGON

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the standards used in regulatory takings cases for determining the constitutionality of exactions or dedications (*e.g.*, *Nollan v. Calif. Coastal Comm'n*; *Dolan v. City of Tigard*) should be used in a condemnation action to determine the admissibility of expert testimony on value based on the best and highest potential use of condemned property and the possible dedication that government might require were the property to be put to that use.

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Petitioners have filed a petition for writ of certiorari asking this Court to grant review of a decision of the Oregon Court of Appeals. The appropriate disposition of this case is to deny the petition or, in the alternative, to grant the petition summarily, vacate the decision of the Oregon Court of Appeals and remand to that court for further consideration in light of the Court's recent decision in *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994).

I. *Overview of the Case and the Issue It Presents*

This is a condemnation action brought by the State of Oregon to acquire approximately two acres of a 13-acre parcel of land to widen a state highway ("Three Mile Lane") near the City of McMinnville. The case was tried in state circuit court solely on the question of valuation — that is, the "fair market value" to be paid as just compensation for the condemned property. The

evidence centered on the testimony of appraisal experts for both sides who had examined the property and formed opinions about the property's market worth. The appraisals offered by plaintiff State of Oregon's expert and that of the defendant landowners' experts were worlds apart, with the state's expert valuing the property at $5,300 and defendants' experts valuing it at $65,074 and $86,000.

The experts for both sides agreed that the condemned property's "best and highest" use is as light industrial land rather than farmland, as it is currently zoned.[1] The wide disparity between their valuations was a consequence of their differing appraisal approaches. In particular, they relied on different comparison sales to assess what a willing buyer would pay a willing seller for property like the property in question. The state's expert, for example, considered only properties zoned for light industrial use or a combination of light industrial and farm use; defendants' experts considered properties zoned for medium and heavy industrial use, and other commercial zoning. The state's expert considered only unimproved land like the subject property; the defendants' experts included comparison sales in which a portion of the sales price had been paid for buildings or other structures rather than for just the land. The state's expert looked to comparisons sales involving only large acreages that had sold on a price-per-acre basis; defendants' experts considered sales of small acreages where the price was set on a per-square-foot basis. The state's expert considered only sales of comparable

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[1]Under the controlling local comprehensive land use plan and ordinances, the property is designated for light industrial use. The record establishes that the defendant property owners could have applied to have the property's zoning changed from farm use to light industrial and that the request would have been routinely allowed if combined with a request for annexation to the City.

properties in the immediate geographic vicinity of the defendants' property; defendants' experts considered sales within a broader geographic range.[2]

In addition to their different selection of comparison sales, the experts disagreed on the effect that demand for and supply of light industrial property might have on the property's value. Defendants' experts did not rely on any specific assessments of demand in their appraisals.[3] The state's expert believed that supply and demand was relevant to assessing market value. He found that there was a surplus of light industrial land in the area and concluded that a demand to develop the land in question probably would not arise for 10 years or so.[4]

Finally, the state's expert took into account the possibility that, as a condition for changing the parcel's zoning from farm use to light industrial, the city might require dedication of a 60–70 foot strip of the land for purposes of widening the abutting highway. Under the local land use plan, the city is obligated to provide the necessary improvements to the road system before intensifying the uses of the land in the area in question, and it has authority to require dedication of land needed for that purpose from property owners seeking to develop their property.[5] The

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[2]Tr. Vol. IV, 28–98.

[3]Tr. Vol. II, 211–13 (Henry); Tr. Vol. II–III, 276–86 (Dell); 348–408 (Dawell).

[4]Tr. Vol. IV, 22–27.

[5]McMinnville's comprehensive plan, formulated in 1971, states in relevant part:

> The City of McMinnville shall develop an access plan to accommodate developments on Three Mile Lane (State Highway 18). The plan shall include specific details concerning the location of access points, the provision of left-turn refuges and acceleration-

(continued...)

state's expert placed the market value at $3,500 an acre for the portion of the property that could be zoned and used as light industrial, and $2,000 an acre for the farm use value of the 70-foot portion that he thought likely would have to be dedicated if the property were rezoned. Because each portion of the property was slightly under an acre, he appraised the total value at $5,300.[6]

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[5](...continued)

deceleration lanes, the connection of properties through an internal circulation system of roads, the responsibility for costs and the timing of required improvements.

(Ex. 104, § 124.00, pp 22-23). McMinnville's Ordinance 4131, which was enacted in 1981 to set forth generally the conditions for development applicable to properties adjacent to Oregon Highway 18, provides as follows:

> The City of McMinnville finds that the development of lands on the north and south sides of Three Mile Lane (Oregon Highway 18) is acceptable if provisions are made to integrate the dual functions of the highway as a by-pass around the City and a land service arterial for adjacent properties. * * *.
>
> * * * * *.
>
> [Section 4] (c) Access requirements adopted hereafter in an access plan for this area shall be adhered to. Provisions of the plan shall include:
>
> 1. The minimization of entrances onto Three Mile Lane,
>
> 2. The development of on-site circulation systems, connecting to adjoining properties,
>
> 3. The provision of acceleration-deceleration lanes and left turn refuges when and where necessary and practicable.

(Ex. 3). Section 17.51.030(E) of McMinnville's general zoning ordinance provides that in approving planned developments, the city may attach conditions to carry out the purpose of the zoning ordinance, as long as needed housing is not excluded or planned densities unnecessarily reduced. (Ex. 105, pp 52-53).

[6]Tr. Vol. IV, 38-41. The expert did not assign a "zero value" to the portion that might be subject to the dedication. Rather, he reasoned that the "best and highest use" of that portion was as farmland, because it could be

(continued...)

Defendants' experts believed that buyers generally do not consider dedication requirements in determining how much to pay for property and, moreover, that the possibility of a dedication in this instance was too speculative and remote.[7] They therefore valued the entire property on the basis of its use as light industrial land. One of defendants' experts placed the value at $86,000 and the other placed it at $65,074. They testified that, were they to reduce their appraisals on the assumption that 70 feet of the property would be validly dedicated for highway widening as a condition of the change of use, their valuations would be $46,970 and $34,650, respectively.[8]

At trial, defendants objected to any valuation evidence that took into account the possible dedication on the theory that for the city to require the dedication would be unconstitutional.[9] The trial judge admitted the state's valuation into evidence over defendants' objection and instructed the jury, again over defendants' objection, that the evidence could be considered for

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[6](...continued)

used as farmland indefinitely without being subject to the dedication requirement. Thus, he valued that portion as farmland, and placed "best and highest use" of the remainder at the value he determined the market would bear for light industrial property. Tr. Vol. IV, 20, 38-39.

[7]Tr. Vol. III, 247-49, 304-10, 319-20 (Dell); 368 (Dawell).

[8]Tr. Vol. III, 394 (Dawell) and 300 (Dell).

[9]Defendants claimed that evidence of the dedication was unconstitutional because the dedication itself would be unconstitutional under *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), thus invoking the Just Compensation Clause of the Fifth Amendment. Defendants also, at trial and on appeal, made less precise references to general due process and equal protection claims. They press those arguments again in their certiorari petition, again in vague form only, without suggesting any independent equal protection or due process principle that adds to or changes the analysis under the Just Compensation Clause.

whatever weight the jury might give it in assessing the property's true market value. The jury returned a verdict for $7,000.

II. ***The Appropriate Disposition of the Case***

Petitioners sought compensation for their property not on the basis of their current use of the subject parcel as farmland, but on the basis of its possible future use as light industrial. In condemnation cases, for purposes of assessing constitutionally required compensation, property typically is to be valued at "best and highest use," which may take into account the most profitable future use to which the property is reasonably likely to be put. *See generally Dept. of Transportation v. Lundberg*, 312 Or. 568, 574–75, 825 P.2d 641 *cert. denied*, 113 S.Ct. 467 (1992) (citing cases and authorities); *Olson v. United States*, 292 U.S. 246, 255 (1934)(highest and most profitable use is that to which the property is adaptable or likely to be put in the reasonably near future). Although petitioners desired to have the condemned property valued on the basis of its potential future use, they wanted the jury to be insulated from any evidence that, as a condition of rezoning the property for that use, the landowner might have to dedicate a portion of the land for widening the highway that the property borders. In the petition for certiorari, petitioners urge that in the absence of an inquiry into the specific needs for a dedication created by the property's potential future use, valuation evidence that took into account the possibility of the dedication violated the Fifth Amendment.

The Oregon Supreme Court has held, unremarkably, that evidentiary use in a condemnation action of a "valid" regulation of a condemnee's land is an admissible and relevant factor in determining just compensation. *Dept. of Trans. v. Lundberg*, 312 Or. at 578; *accord Dept. of Trans. v. Altimus*, Pet. Cert. App. 6. But unlike a "regulatory takings" case, in a condemnation

action the question whether government may "validly" condition development of property on a dedication or exaction arises only indirectly. Here, government has not sought to require an uncompensated dedication of land as a condition of a specific development proposed by a landowner. Rather, the "validity" of the dedication arises only in relation to a determination of what value to place on a parcel of property that government is taking by condemnation and for which it is willing to pay.

When the Oregon Court of Appeals decided this case, the most recent guidance on the constitutionality of government imposed regulatory dedications was this Court's decision in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and the Oregon Supreme Court's decision in *Dolan v. City of Tigard*, *supra*. Under both decisions, the validity of a governmental condition on land development requires an examination of the "nexus" between the impacts of the development and the purpose to be served by the governmental condition. Applying the standards announced in those cases for determining the validity of a dedication in a regulatory takings context, the Oregon Court of Appeals found that the dedication in this case was constitutional. It held that "the requisite nexus exists between the increased need for proper traffic circulation created by proposed industrial development and the dedication of a portion of defendants' land to a highway widening project that would obviate the need for the city to build a frontage road." Pet. Cert. App. 10.

After the Oregon Court of Appeals issued its decision, this Court granted certiorari in *Dolan* and reversed the Oregon Supreme Court's judgment. 114 S.Ct. 2309 (June 24, 1994). In doing so, the Court expanded on the "nexus" requirement articulated in *Nollan*. It announced that the examination of the "substantial nexus" between the impacts of development and

regulation of that development was only half of a two-part inquiry. In addition to requiring an examination of the *nature* of the condition placed on the development, validity of a governmental exaction turns also on the *extent* of the condition. 114 S.Ct. at 2319-20. The Court termed the appropriate standard "rough proportionality." 114 S.Ct. at 2319. Mathematical precision is not required, but there must be some sort of determination that the required dedication is related in extent to the anticipated impacts of the development. 114 S.Ct. at 2319-20. Thus, at least in the context of a regulatory takings case, the Court's decision in *Dolan* requires some form of the more specific inquiry that petitioners suggest should be required in a condemnation action.

Rather than suggest that the issue presented merits a grant of certiorari, the Court's decision in *Dolan* demonstrates that the petition should be denied. The Oregon Court of Appeals was undoubtedly correct in concluding that the requisite "nexus" exists between the impacts of the potential development of the condemned property and the need for highway improvement. In *Dolan*, the Court recognized that reducing traffic congestion is a legitimate public purpose that bears a substantial nexus to the impacts of more intensified commercial land use: "Dedications for streets, sidewalks, and other public ways are generally reasonable exactions to avoid excessive congestion from a proposed property use." 114 S.Ct. at 2321. *Dolan* thus validates the Oregon Court of Appeals' conclusion that the nexus requirement was facially satisfied by the potential dedication of a strip of the landowner's property as a condition for changing its use to light industrial, a use that would have an unquestionable impact on traffic flow in that area.

Beyond that, petitioners simply seek to overlay onto the condemnation context an inquiry that has no proper application there. The *Dolan* proportionality examination logically cannot be made when there is no specific development proposal by a landowner to change the use of the property and when the government is not yet insisting on applying any dedication. Similarly, it makes no legal sense to assess whether the potential scope of a dedication satisfies *Dolan*'s proportionality test in circumstances where a takings claim is not even ripe because the dedication requirement is as yet hypothetical only. *Cf. Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 191 (1985)(a taking claim is premature in the absence of a final, definitive position by government on how regulations will be applied to a particular piece of land). In effect, *Dolan* announces an "as applied" test for regulatory takings that can and should have no application in this context. If a potential dedication is not facially unconstitutional, so that it cannot be said that it has no valid application to any set of circumstances,[10] any issue about application of the dedication as it bears on best and highest use of condemned property for valuation in a condemnation case properly is left to expert opinion, with opportunities for cross examination and for the jury to give whatever weight it may choose to those opinions.[11]

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[10]*See Yee v. City of Escondido, Cal.*, 503 U.S. ___, 112 S.Ct. 1522, 1532 (1992).

[11]That approach is the general solution for the myriad questions that typically surround prospective uses to which the property may put. *See generally* 5 NICHOLS ON THE LAW OF EMINENT DOMAIN, § 18.05[3] (3d ed. 1994); Morrison, *Highest and Best Use of Property Taken Under Eminent Domain*, 19 AM. JR. PROOF OF FACTS 3d 613 (1993). There is no reason to take a different approach in considering limitations or conditions that may be placed on those prospective uses.

The petition should be denied for a second and independent reason. The record strongly suggests that the evidence of the dedication played no part in the jury's award of compensation.[12] Because of that, even if this Court were to grant the petition, its review of the issue would be complicated by the fact that it may not be squarely presented by the verdict in the case. The Court might reach the evidentiary question only to conclude that it should not resolve it because the evidence was not prejudicial in any event and the jury's verdict should not be disturbed.

Alternatively, the Court at most should vacate the Court of Appeals' judgment and remand this case to the Oregon Court of Appeals for further consideration in light of this Court's decision in *Dolan*. The state courts have never had an opportunity to decide, in the first instance, whether the kind of inquiry *Dolan* demands in a regulatory takings context should apply when dedications or exactions are considered for purposes of determining value in a condemnation action. Obviously, the contexts are meaningfully different. If at some point the question merits this Court's attention, the Court's review may be better informed if lower courts generally have first had the opportunity to reach some consensus, or lack of consensus, on how the issue

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[12]As already described, the state's expert valued the property at approximately $5,300, a value that reflected industrial use for half of it, and farm use for the half that would potentially have been subject to dedication. The jury awarded $7,000 in compensation. Necessarily, the jury completely rejected the basis on which defendants' experts valued the property, which even accounting for the potential dedication would have been at least $34,650. The only logical explanation for the jury's award is that the jury accepted the state expert's value of $3,500 per acre for light industrial use, applied that figure to all of the property (including the portion that might be subject to dedication), and rounded the amount of property to an even two acres, thus awarding $7,000 in total.

should be resolved.[13] Moreover, application of *Dolan* to this case would trigger the need for a fact-bound, case-specific examination of the particular trial record developed. That examination should be made first by the state court. At this juncture, the case does not justify an extraordinary grant of this Court's certiorari jurisdiction or an expenditure of this Court's limited resources.

CONCLUSION

The Court should deny the petition of writ of certiorari.

Respectfully submitted,

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[13]Although the petition for certiorari tries to argue that the issue this case presents "arises with increasing frequency," (Pet. Cert. Question Presented), petitioners are not able to show that it has been the subject of numerous lower court decisions, or that there is any significant split of authority on the question at lower court levels. To the contrary, the circumstances presented by this case appear rarely to generate case law. Lower court cases that are on point are in basic accord with the Oregon Court of Appeals resolution of this case. *See, e.g., People ex rel. Dept. Pub. Wks. v. Investors Diversified Services, Inc.*, 262 Cal. App. 2d 367, 68 Cal. Rptr. 663 (App. 2d Dist. 1968). Whether the issue will arise with any greater frequency in the aftermath of the *Dolan* decision remains to be seen.